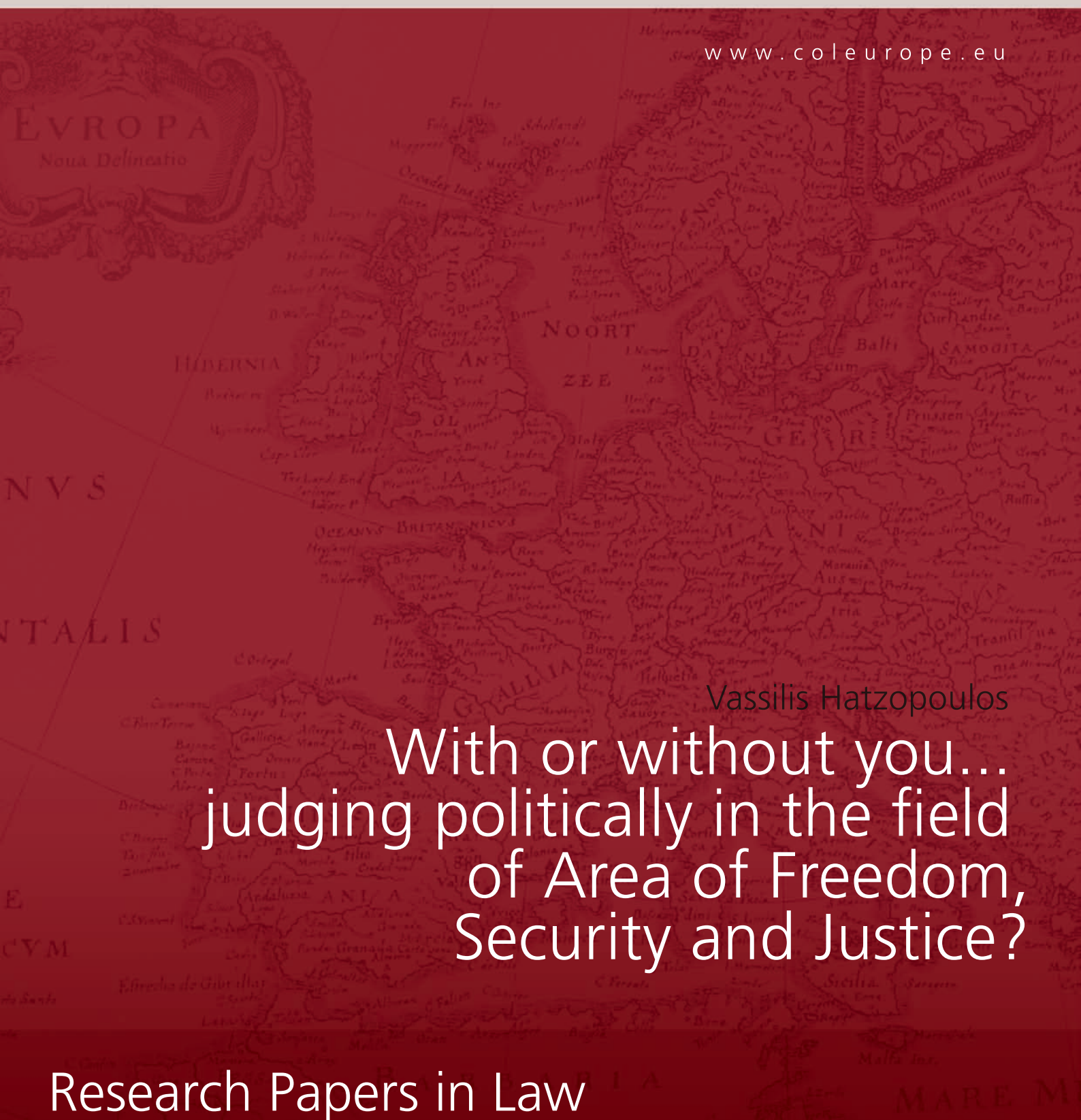




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Vassilis Hatzopoulos

# With or without you... judging politically in the field of Area of Freedom, Security and Justice?

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Security and Justice?**

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## With or without you... judging politically in the field of Area of Freedom, Security and Justice?

DRAFT not to be quoted, to be published in the ELRev

Vassilis Hatzopoulos \*

### 1. Introduction

The study of the European Court of Justice's (ECJ) case law of the regarding the Area of Freedom Security and Justice (AFSJ) is fascinating in many ways.<sup>1</sup>

First, almost the totality of the relevant case law is extremely recent, thereby marking the first 'foundational' steps in this field of law. This is the result of the fact that the AFSJ was set up by the Treaty of Amsterdam in 1997 and only entered into force in May 1999.<sup>2</sup>

Second, as the AFSJ is a new field of EU competence, it sets afresh all the fundamental questions – both political and legal – triggered by European integration, namely in terms of: a) distribution of powers between the Union and its member states, b) attribution of competences between the various EU Institutions, c) direct effect and supremacy of EU rules, d) scope of competence of the ECJ, and e) measure of the protection given to fundamental rights. The above questions beg for answers which should take into account both the extremely sensible fields of law upon which the AFSJ is anchored, and the EU's highly inconvenient three-pillar institutional framework.<sup>3</sup>

Third, and as a consequence of the above, the vast majority of the ECJ's judgments relating to the AFSJ are a) delivered by the Full Court or, at least, the Grand Chamber, b) with the intervention of great many member states and c) often obscure in content. This is due to the fact that the Court is called upon to set the foundational rules in a new field of EU law, often trying to accommodate divergent considerations, not all of which are strictly legal.<sup>4</sup>

Fourth, the case law of the Court relating to the AFSJ, touches upon a vast variety of topics which are not necessarily related to one another. This is why it is essential to limit the scope of this study. The content of, and steering for, the AFSJ were given by the Tampere European Council, in October 1999. According to the Tampere Conclusions, the AFSJ should consist of four key elements: a) a common immigration and asylum policy, b) judicial cooperation in both civil and penal matters, c) action against criminality and d) external action of the EU in all the above fields. Moreover, the AFSJ is to a large extent based on the Schengen acquis. The latter has been 'communautarised'<sup>5</sup> by the Treaty of Amsterdam and further 'ventilated' between the first and third pillars by decisions 1999/435 and 1999/436.<sup>6</sup> Judicial cooperation in civil matters, mainly by means of international conventions (such as the Rome Convention of 1981 on the law applicable to contractual obligations) and regulations (such as (EC) 44/2001<sup>7</sup> and (EC) 1348/2000<sup>8</sup>) also form part of the AFSJ. However, the relevant case law of the ECJ will not be examined in the present contribution.<sup>9</sup> Similarly, the judgments of the Court delivered in the course of Article 226 EC proceedings against member states, will be omitted.<sup>10</sup> Even after setting aside the above case law and

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<sup>1</sup> For an earlier and very interesting account of the same case law, see H. Labayle 'Architecte ou spectatrice? La Cour de Justice de l'Union dans l'Espace de liberté, sécurité et justice', RTDEur 42(1), 2006, p.1.

<sup>2</sup> However, some judgments which pre-date the entry into force of the Amsterdam Treaty may not be omitted.

<sup>3</sup> As it will be shown, however, the Court tends to bridge the institutional gaps.

<sup>4</sup> See the conclusions of the present contribution.

<sup>5</sup> 'Unionised' would be the more accurate word.

<sup>6</sup> [1999] OJ L 176/1 and 176/17, respectively.

<sup>7</sup> [2001] OJ L 12/1.

<sup>8</sup> [2000] OJ L 160/37.

<sup>9</sup> Judgments in the field of judicial cooperation in civil matters are, in chronological order: Case 443/03 *Leffler* [2005] nyr; Case C-1/04 *Staubitz-Schreiber* [2006] nyr; Case C-473/04 *Plumex* [2006] nyr; Case 234/04 *Kapferer* [2006] nyr; Case C-103/05 *Eurofood IFSC* [2006] nyr; Case C-103/05 *Reisch Montage* [2006] nyr, Case C-283/05 *ASML & SEMIS* [2006] nyr, Case C-386/05 *Color Drack* [2007] nyr.

<sup>10</sup> These cases are: Case C-462/04 *Commission v Italy, recognition of expulsion decisions* [2005] nyr; Case C-448/04 *Commission v. Luxembourg, recognition of expulsion decisions* [2005] nyr; Case C-449/04 *Commission v Luxembourg, carriers' sanctions* [2006] nyr; Case C-103/05 *Commission v. Austria, asylum admission procedures*

notwithstanding the fact that the AFSJ only dates as far back as May 1999, the judgments of the ECJ are numerous. A simple (if not simplistic) categorisation may be between, on the one hand, judgments which concern the institutional setting of the AFSJ (para. 2) and, on the other, judgments which are related to some substantive AFSJ policy (para. 3).

## 2. Institutional settings of the AFSJ

### 2.1. The AFSJ as a prerequisite for the fundamental objectives of the EU

It has been stated above that the creation of an AFSJ is the expression of some clear political will, associated with the partial “communitarisation” of the EU third pillar. This, however, is only part of the truth. In parallel with the *political processes* which led to the above result, the ECJ has shed the *legal foundations* of the AFSJ, by directly connecting it with the materialisation of the fundamental objectives of the EC, i.e. the internal market and European Citizenship. The Court spelt out the above connection in its judgment in *Wijsenbeek*.<sup>11</sup> This case concerned a Dutch citizen (who also happened to be a member of the European Parliament) who, after the theoretical completion of the internal market and the entry into force of the Maastricht Treaty, refused to produce any travel document upon entry into the Netherlands from Strasbourg. He argued that Article 7a EC proclaiming the completion of the internal market, and Article 8 EC establishing the European Citizenship justified such a refusal. Hence, the Court was called upon to rule whether the above Treaty provisions were directly applicable or, whether, they pre-supposed some harmonisation between member states. The Court opted for the latter solution, and maintained that the abolition of border controls

‘40. [...] presupposes harmonisation of the laws of the member states governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions’

as well as that

‘42. [...] as long as Community provisions on controls at the external borders of the Community ... have not been adopted [...]

43. [...] the member states retained the right to carry out identity checks at the internal frontiers of the Community, requiring persons to present a valid identity card or passport’

Hence, the Court established a clear connection between the first and third pillars of the EU Treaty. In tandem, it set the conditions for the parallel interpretation of the rules of the two pillars. Furthermore, the creation of the AFSJ ceased being a mere political choice but also appeared a legal necessity.

The subsequent creation of the AFSJ and the gradual adoption of the basic binding legislative texts have led the ECJ to reverse the above judgment. In a series of recent judgments the Court holds that ‘Union citizenship is destined to be the fundamental status of nationals of the member States’<sup>12</sup> and recognises that autonomous rights may stem directly from Citizenship.<sup>13</sup> In parallel in *Oulane*<sup>14</sup> the Court held that at the present (advanced) stage of development of the internal market, entry into another member state may not depend on the presentation of a valid passport or identity card, provided that the identity of the person concerned may be proved by other means.

### 2.2. The ECJ’s own competence in the AFSJ

The very fact that we examine the case law of the Court in the AFSJ, presupposes that the Court does, indeed, have competence in this field. It is reminded that under the Maastricht Treaty the Court had no jurisdiction at all in the third pillar, while the Amsterdam

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[2006] nyr; Case C-48/06 *Commission v Luxembourg, assistance to illegal entry* [2006] nyr; Case C-72/06 *Commission v Greece, asylum admission procedures* [2007] nyr.

<sup>11</sup> Case C-378/97 *Wijsenbeek* [1999] ECR I-6207.

<sup>12</sup> See, for instance, Case C-224/98 *D’Hoop* [2002] ECR I-6191, para. 28. This same idea has been repeatedly expressed in all the subsequent judgments of the Court concerning Citizenship, for which see the following footnote.

<sup>13</sup> For the totality of the relevant case law see among others S. Giubboni ‘Free Movement of Persons and European Solidarity’ (2007) ELJ 360-379; V. Hatzopoulos ‘A (more) social Europe: A political crossroad or a legal one-way? Dialogues between Luxembourg and Lisbon’ (2005) CMLrev 1599-1635.

<sup>14</sup> Case C-215/03 *Oulane* [2005] nyr.

Treaty conferred to it only limited powers.<sup>15</sup> More precisely, in the third pillar the ECJ may only hear preliminary questions from the jurisdictions of member states who have submitted a declaration to that effect (Art. 35 EU),<sup>16</sup> and only in relation to framework decisions, decisions and conventions (i.e. not in relation to common positions or to primary law – but see the developments which follow). Moreover, only privileged applicants (i.e. EC Institutions and member states) – but not individuals – may introduce annulment proceedings against framework decisions and decisions (Art. 35(6) EU). More surprisingly still, the competence of the ECJ is also restricted in Title IV of the first pillar, as the Court may only hear preliminary questions originating from national jurisdictions of last resort (Art. 68 EC).<sup>17</sup>

Against this background, however, the ECJ follows an extensive approach and tends to adopt a unitary position concerning its own competence in the field of ASFJ.

### 2.2.1. Annulment proceedings

The Court was first called upon to pass judgment on its competence in the ASFJ after the Commission's annulment proceedings against a common action of the Council. This latter concerned the conditions for the delivery of air transit visas.<sup>18</sup> The ECJ rejected the Council's argument concerning the Court's lack of jurisdiction by grounding its argument on Article 47 (then M) of the EU Treaty. This Article stipulates that action by the EU in the second and third pillars may not undermine the competences of the EC (first pillar). Therefore, the ECJ should have the competence to interpret those provisions of the EC Treaty which may be affected by action in the two other (intergovernmental) pillars. Hence, the Court is 'incidentally' competent to interpret the relevant third pillar provisions, despite the complete lack of such powers stemming from the Treaty.

The judgment in the *air transit visas* case does not only have historical value, given that the Court's competence in the third pillar is still restricted. The recent cases concerning the imposition of 'smart sanctions' (in the form of the 'freezing' of assets) to persons, organizations etc allegedly connected to terrorism, offer a vocal illustration of the Court's perception of the extent of its own jurisdiction. In this respect, the Court of First Instance (CFI) has delivered three series of important judgments<sup>19</sup> and, on appeal,<sup>20</sup> the Court another three.<sup>21</sup> The factual background of all five cases decided by the CFI is very similar.<sup>22</sup> In order to implement several UN Security Council resolutions the Council of the EC has adopted several common positions based on the second (and occasionally) third pillar. On the basis of these common positions, and for their implementation, several first pillar regulations and decisions have been adopted. In all cases, the plaintiffs asked for the annulment of the totality of the above acts. The CFI started by reminding that common positions of either the second or third pillar are, in principle, outside the realm of its control. It went on, however, to state that

<sup>15</sup> See S. Peers 'Who's Judging the Watchmen? The judicial System of the 'Area of Freedom, Security and Justice'', Yearbook of European Law (18) 1998, p. 337.

<sup>16</sup> According to unpublished information gathered by the author, as of December 2006 only sixteen member states had made a declaration under Art. 35(3). These include Austria, Belgium, the Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Slovenia, Spain, Sweden, and Portugal. Of these sixteen, only Spain and Hungary have restricted the right to refer to the ECJ to national jurisdictions judging without appeal.

<sup>17</sup> For a very critical account of this Treaty provision see C. Cheneviere, 'L'article 68 CE – Rapide survol d'un renvoi préjudiciel mal compris' (2004) CDE 567-589. See also the Commission communication COM (2006) 346 final, of June 28th 2006, where it proposes that Article 234 EC should also become plainly applicable in the field of Asylum, Immigration and Visas.

<sup>18</sup> Case C-170/96 *Commission v Council, air transit visas* [1998] ECR I-2763.

<sup>19</sup> Cases of the same date T-306/01 *Yusuf* and T-315/01 *Kadi* [2005] nyr, for which see D. Simon & F. Mariatte, 'Le tribunal de première instance des Communautés : Professeur de droit international ? A propos des arrêts *Yusuf* et *Kadi*' (2005) *Europe* chron. 12, p. 6 ; and cases of the same date T-253/02 *Ayadi* and T-49/04 *Hassan* [2006] nyr, for which see D. Simon & F. Mariatte 'Le 'droit' à la protection diplomatique : droit fondamental en droit communautaire ?' (2006) *Europe* chron. 11 p. 4 ; See also case T-228/02 *Mojahedines* [2006] nyr; all the above cases are currently under appeal before the ECJ.

<sup>20</sup> For all five cases, appeals are currently pending before the ECJ; the three appeal judgments already delivered by the ECJ concern previous orders by the President of the CFI.

<sup>21</sup> Case C-229/05 *Ocalan* [2007] nyr; Case C-354/04 P *Gestoras pro Amnestia* [2007] nyr and Case C-355/04 P, *Segi* [2007] nyr, both delivered on February 27, 2007; for these two cases see E. Meisse in (4/2007) *Europe* comm. 110, p. 24-25.

<sup>22</sup> On similar facts and concerning the imposition of smart sanctions the CFI has actually delivered some more judgments and orders, of lesser importance, which are not discussed here; see for instance: Case (order) T-338/02 *Segi e.a.* [2004] ECR II-1647; Case (Order) T-299/04 *Selmani* [2005] nyr; Case T-362/04 *Minin* [2007] nyr

'the Court of First Instance has jurisdiction to hear an action for annulment directed against a Common Position adopted on the basis of Articles 15 EU and 34 EU only strictly to the extent that, in support of such an action, the applicant alleges an infringement of the Community's competences'.<sup>23</sup>

In *Mojahedines*, the most recent of the five and the only one in which the CFI did in fact annul some of the attacked acts, the acts annulled were neither the common position, nor the regulation, but rather the implementing decisions which affected the plaintiffs directly and individually. Both the end result and the wording of the judgment suggest that third pillar acts which lie outside the Court's jurisdiction (*in casu*: common positions) rarely affect third parties themselves, but rather lead to the adoption of other acts (such as individual decisions) which are subject to judicial review. Therefore, the 'rule of law' is preserved.

This 'rule of law' approach was further pursued in the two extremely important judgments of the Court, in appeal proceedings against an Order of the President of the CFI.<sup>24</sup> In *Gestoras pro Amnestia* and *Segi*, the President of the CFI had declared inadmissible an action in damages against the EC Institutions which had placed some individuals and organizations on the list of presumed terrorists. The Court, confirming on this point the CFI, started by recognising that the system of judicial protection foreseen by the Treaty for the third pillar is incomplete compared to that of the first pillar and that no action in damages lies outside the latter.<sup>25</sup> It went on, however, to hold that by virtue of Article 6 EU the Union is based on the rule of law and the respect of fundamental rights.

'It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the member States when they implement the law of the Union'.<sup>26</sup>

In consequence, the Court found that all acts (under all pillars) which have the effect of directly affecting individual rights may be brought before the ECJ by way of a preliminary question, even if this is not expressly provided for in the relevant Treaty provision. They may also be challenged by the privileged applicants (EC Institutions and member states) in accordance with Article 35(6) EU.<sup>27</sup> And since individual plaintiffs are not eligible to bring annulment actions against acts of the second or third pillar,

'it is for the member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them'.<sup>28</sup>

Therefore, based on the rule of law approach, the Court partly reviews the procedural arrangements of the Treaty, in order to ensure that any act producing legal effects is subject to a) judicial review and b) its own preliminary jurisdiction. In doing so, the Court offers impetus for further integration of the supranational with the national level, as it admits that acts produced in the former may be effectively reviewed in the latter. This reasoning, however, is partly flawed, as it tends to ignore the fact that not all member states have accepted the Court's preliminary jurisdiction under Articles 35(2) and 35(3) EU.<sup>29</sup> More importantly, the Court highlights the gaps of legal protection present in the third pillar of the EU, and calls upon the member states to address them.

While this 'rule of law' approach is clearly dominant in the Court's case law concerning its own jurisdiction in the AFSJ, some lacunae of legal protection remain. The AFSJ is one of the fields of EU law where the traditional distinction between rule-making at the supranational level and rule implementing at the national level, is increasingly blurred. Indeed, many of the common policies put forward at the EU level also require common action for their implementation. Therefore, the AFSJ is one of the fields in which new EU Agencies

<sup>23</sup> *Mojahedines* para 56.

<sup>24</sup> Above n. 22.

<sup>25</sup> *Gestoras pro Amnestia*, para. 50.

<sup>26</sup> *Ibid*, para. 51; and more recently *Advocaten voor de Wereld* para 45.

<sup>27</sup> *Ibid*, para. 55.

<sup>28</sup> *Ibid*, para. 56. In this respect this judgment operates a clear reversal of the Orders of the CFI, where it was maintained that, against a Common position, individuals have no remedy neither under EU nor under national law. The same restrictive solution has also been adopted by the French Conseil d'Etat, in its judgment in case *Dispans c/ Ministre de l'Intérieur*, 11-12-06, AJDA 2007, p. 421; for this French case see D. Simon in (4/2007) *Europe*, comm. 108, p. 23.

<sup>29</sup> For the countries which have accepted the said jurisdiction see above n. 16.



develop and flourish.<sup>30</sup> Europol, Eurojust, CEPOL (College of European Police), EBA (European Border Agency), FRA (Fundamental Rights Agency) are only some of the Agencies involved in the management of the AFSJ.<sup>31</sup> These Agencies do not, in principle, issue binding acts. Therefore, their action is only subject to some kind of 'principal – agent' supervision by the Institution to which they are attached (i.e. the Commission or Council)<sup>32</sup>, as well as to indirect control by the European Parliament and the Ombudsman. It is not, however, subject to judicial review. Moreover, the 'acts' they issue do not fall within the typology of those provided for in Articles 230 EC (first pillar) or 35(7) EU (third pillar), in which the ECJ does have competence to review. The question arose as to whether the terms and conditions (concerning the linguistic qualifications of the participants) for the selection of personnel for Eurojust could be challenged by a member state (i.e. a privileged applicant).<sup>33</sup> The Court answered to the negative. It maintained that the rule of law is sufficiently protected by both the individual right of participants to challenge the terms of the selection procedure before the CFI, and the right of member states to intervene in the proceedings. Therefore, in an effort to protect EU Agencies from the stronghold of member states and from the risk of their independency being systematically challenged, the Court allows for a limited gap in legal protection against their action.<sup>34</sup>

### 2.2.2. The preliminary competence of the ECJ

The judgment of the Court in *Pupino*<sup>35</sup> – a foundational case in relation to the binding character of acts of the third pillar –<sup>36</sup> was delivered in preliminary proceedings initiated by an Italian jurisdiction, under Article 35 EU, in relation to a framework decision in the field of criminal law. Before answering the substantive issues raised by the referring jurisdiction, the ECJ had to reject some admissibility claims put forward by some of the intervening member states. In doing so, the Court made it clear that the preliminary procedure provided for by Article 35 EU is governed by the same interpretative rules (concerning the qualification of the referring body as a 'jurisdiction', the clarity and necessity of the question referred to the Court etc), as that of Article 234 EC.<sup>37</sup> Moreover, it should be noted that in its recent judgment in *Gestoras pro Amnestia*, the Court drew from the logic of Article 234 (first pillar) in order to extend the scope of the preliminary procedure provided for by Article 35 EU (third pillar).

Far more spectacular, in relation to the preliminary jurisdiction of the Court, is the very recent judgment in *Advocaten voor de Wereld*.<sup>38</sup> In a judgment delivered by the Grand Chamber, with the intervention of no less than ten member states (the conclusions of which were, for once, followed by the Court) the Court upheld the validity of the Council's framework decision which established the European arrest warrant.<sup>39</sup> A Belgian NGO contested before the Belgian courts the legality of the law which transposed into national law the aforementioned framework decision. The Belgian court, faced with one formal and two

<sup>30</sup> In general for Agencies see E. Chiti, 'The Emergence of a Community Administration: the Case of European Agencies' (2000) CMLRev 309-343, E. Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?' (2000) CMLRev 1113-1134, X. Yataganas, 'Delegation of Regulatory Authority in the EU, The Relevance of the American Model of Independent Agencies' (03/01) Jean Monnet Paper, G. Majone, 'Delegation of regulatory powers in a mixed polity' (2002) ELJ 319-339, P. Craig, 'The constitutionalisation of Community administration' (2003) ELRev 840-864, M. Flinders, 'Distributed public governance in the EU' (2004) JEPP 520-544 and D. Geradin & N. Petit, 'The development of Agencies at EU and national levels: Conceptual analysis and proposals for reform' (2004) YEL, OUP, Oxford, 137-197; see also the Commission communication COM (2002) 718 final.

<sup>31</sup> For the acts instituting these agencies see the Europol Convention of 26 July 1995 [1995] OJ C 316/; Decision 2002/187/JHA [2002] L 63/1; Decision 2005/685/JHA [2005] OJ L 256/63; Regulation (EC) 2007/2004 [2004] OJ L 349/1; Regulation (EC) 168/2007 [2007] OJ L 53/1, respectively.

<sup>32</sup> With few exceptions, supervision is essentially indirect and operates mainly through a) the nomination/revocation of members and/or of the board of managers and/or of the Director of the Agencies, b) control over their financial resources and their use, c) a yearly report submitted to the supervising Institution and (more often than not) to the European Parliament.

<sup>33</sup> Case C-160/03 *Spain v Eurojust* [2005] nyr.

<sup>34</sup> However, it is not clear whether this finding holds true after the very broad principles of legal protection established by the Court in its more recent judgments in *Gestoras* and *Segi*, see above.

<sup>35</sup> Case C-105/03 *Pupino* [2005] nyr.

<sup>36</sup> For which see below 2.3.2.

<sup>37</sup> It is reminded that according to Art. 35 EU member states are free to make a declaration as to whether they accept the Court's preliminary jurisdiction and, in the case that they do, whether all - or only higher - jurisdictions should have direct access to the Court. It is remarkable that out of sixteen member states who have submitted declarations, only two have limited the access of their tribunals to the ECJ. The remaining fourteen include countries such as: Austria, the Benelux countries, the Czech Republic, Finland, France, Germany, Greece, and Italy.

<sup>38</sup> Case C-303/05 *Advocaten voor de Wereld* [2007] nyr, judgment delivered on may 3d, 2007.

<sup>39</sup> Framework decision 2002/584/JHA of 13 June 2002 [2002] OJ L 190/1.

substantive grounds for annulment put forward by the NGO, decided to make a reference to the ECJ, according to Article 35 EU. Contrary to Article 234 EC or even 68 EC (in Title IV EC), Article 35 EU only provides for the interpretation by the Court, of secondary legislation and not of the Treaty provisions themselves. Hence, one of the intervening states in the proceedings before the Court deemed the preliminary question inadmissible in that it (indirectly) required the Court 'to examine Article 34(2)(b) EU, which is a provision of primary law not reviewable by the Court'.<sup>40</sup> The Court remained unconvinced by this argument, as well as by the stark difference of wording of the above-mentioned Treaty provisions. It held that:

'Under Article 35(1) EU, the Court has jurisdiction [...] to give preliminary rulings on the interpretation and validity of, *inter alia*, framework decisions, which necessarily implies that it can, even if there is no express power to that effect, be called upon to interpret provisions of primary law [...] where [...] the Court is being asked to examine whether a framework decision has been properly adopted on the basis of that latter provision.'<sup>41</sup>

Therefore, the Court reshapes its preliminary competence in the third pillar in parallel with that of the first. Not only does it extend its jurisdiction to all acts of secondary legislation (see *Gestoras pro Amnestia* in relation to common positions), but also it interprets the Treaty provisions themselves, of a Treaty deemed 'intergovernmental' (see *Advocaten voor de Wereld*).

In relation to the parallelism observed above, two ongoing initiatives should be mentioned. First, the Commission has proposed the adjustment of Article 68 EC to Article 234 EC and the full alignment of the two preliminary procedures of the first pillar, which should be open to all national jurisdictions rather than only to those decisions which are not subject to appeal.<sup>42</sup> Second, in view of the above perspective, the President of the ECJ has taken the initiative to propose to the Council a modification of its own statute, in order to introduce a fast-track 'interim' preliminary procedure specifically reserved to AFSJ issues.<sup>43</sup> This proposal has been taken up by the Council but its actual implementation remains pending.

## 2.3. Nature of the acts

### 2.3.1. First pillar acts may contain rules of criminal law

The breaking of the third pillar and its partial 'communautarisation' led to the adoption of 'twin' acts in the field of AFSJ. For instance, Directive 2002/90/EC on 'defining the facilitation of unauthorised entry' is complementary to Framework Decision 2002/946/JHA on the sanctions to be imposed on those perpetrating the acts described by the directive.<sup>44</sup> Similarly, the development of the SIS II required both a first pillar regulation ((EC) 242/2001) and a third pillar Framework Decision (2001/866/JHA).<sup>45</sup> This situation is far from being satisfactory as a) the different acts are adopted following different procedures, b) their content is not strictly homogenous, c) they have different intrinsic characteristics and d) they differ as to their binding effects, especially in relation to these member states who have signed special protocols (the UK, Ireland, Denmark). This has been considerably eased by the judgment of the Court in the *Sanctions for the environment* case.<sup>46</sup> Eleven out of fifteen member states intervened in the proceedings of this case, decided by the Grand Chamber of the Court. At stake was whether Framework Decision 2003/80/JHA which imposed penal sanctions for the protection of the environment had rightly been adopted by the Council within the third pillar (under Articles 29, 31 and 34 EU) and not in the form of a directive under Article 175 EC, on environmental policy. Based on the general declarations of Articles 2, 3 and 6 EC and on the more specific provisions on the environmental policy of the EC (Articles 174-176 EC), the Court, contrary to the conclusions of all the intervening member states, ruled that limited harmonization of criminal law may take place in first pillar acts, where this is necessary for the achievement of the Treaty objectives.<sup>47</sup>

<sup>40</sup> *Advocaten voor de Wereld* para 17.

<sup>41</sup> *Ibid* para 18.

<sup>42</sup> See above n. 17.

<sup>43</sup> Documents 13272/06 of September 28<sup>th</sup>, 2006.

<sup>44</sup> [2002] OJ L 328/17 and 328/1, respectively.

<sup>45</sup> [2001] OJ L 328/4 and 328/1, respectively.

<sup>46</sup> Case C-176/03 *Commission v Council, sanctions for the environment* [2005] nyr.

<sup>47</sup> *Ibid* para. 52.



This judgment concerned a field of law which bears no direct relation to the AFSJ. Nonetheless, it is of cardinal importance for the development of the latter, since it seems to be opening the way for the adoption of 'single' (as opposed to 'twin') acts in the 'communitarised' part of the AFSJ (i.e. Title IV EC Treaty on asylum, immigration and visas), without the need of parallel third pillar acts.

### 2.3.2. Direct effect of third pillar acts?

The question raised in *Pupino*<sup>48</sup> concerned the legal effects of a framework decision during the period foreseen for its transposition (without any delay or failure) by member states. The framework decision at stake contained provisions for the protection of particularly vulnerable victims (in this case: very young children) in the criminal procedure. Similar provisions already existed in the Italian Code of criminal procedure, but were more restrictive and did not cover the factual situation at stake. Therefore, the question was raised whether the Italian rules should be interpreted extensively, in order for them to become compatible with the framework decision. It is reminded that the very Article 34(b) EU specifically provides that framework decisions do 'not entail direct effect'. Notwithstanding, the Court held that, like directives, framework decisions are fully binding on member states as to their objectives and, hence, give rise to an obligation of *interpretation conforme* of national law. However, this obligation is less far reaching than fully-fledged direct effect, as it may not lead to a *contra legem* interpretation (and of course, may not lead to the substitution) of incompatible national legislation.<sup>49</sup>

The judgment in *Pupino* is also important in a more general way as it establishes a 'parallelism clause' between the rules of the first and of the third pillar, by maintaining that: '*Irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives.*'<sup>50</sup> (emphasis added).

In other words, the Court states that no matter what the member states put into the Treaty, there is an overarching logic inherent to the functioning of the EU, commanded by the effectiveness of the integration project (!).

More important still and despite there being no equivalent to Article 10 EC in the third pillar, the Court establishes that member states are under a duty of 'loyal cooperation' between one another. This is a general interpretative principle which may have extremely far-reaching implications for the future development of the AFSJ and the duties of member states in this field.<sup>51</sup> The same principle has subsequently been used by the Court in *Mojahedines*, *Gestoras pro Amnestia* and *Segi*,<sup>52</sup> in order to distinguish whether the adoption of the contested acts fall within the responsibility of member states or of the EU. A more far-reaching application of the principle of 'loyal cooperation' is certainly forthcoming.

## 2.4. Legislative procedure

The legislative procedure in relation to the AFSJ may be qualified as, at least, multilayered and complex. Suffice it to remind that a) a considerable part of the AFSJ *acquis* has been adopted according to unclear procedures under very poor transparency conditions within the Schengen framework before its 'communitarisation' by the Amsterdam Treaty,<sup>53</sup>

<sup>48</sup> Above n. 35

<sup>49</sup> *Pupino*, para. 47.

<sup>50</sup> *Ibid* para. 36.

<sup>51</sup> In general, for the implications of the duty of loyal cooperation under EC law see: V. Constantinesco 'L'article 5 CEE, de la bonne foi à la loyauté communautaire' in *Liber Amicorum Pierre Pescatore* (1987) p. 97 and, more recently, J. Temple Lang 'The Duties of Cooperation of National Authorities and Courts and the Community Institutions under Article 10' General Report FIDE XIX Conference, Helsinki 1-3 June 2000, p. 373.

<sup>52</sup> For which see above para. 2.2.1.

<sup>53</sup> Wallace (Lord of Saltaire) 'National and European Parliamentary Control of Schengen: Gains and Outstanding Deficits', in M. den Boer (ed.) *Schengen Still Going Strong* (2000) IEAP, Maastricht, p. 121-129, P.-J. Kuijper 'Some Legal Problems Associated with The Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis' (2000) CMLRev, 345, D. Thym 'The Schengen Law: A Challenge for Legal Accountability in the EU' (2/2002) ELJ 218-245.

b) often 'twin' acts are adopted in the first and third pillars, c) following procedures which differ not only between the pillars, but also d) in time, with the end of the five-year transition period (in May 2004) as the breaking point<sup>54</sup> and where e) the requirement of unanimity in the Council and f) the dominant role played by committees and working groups by national experts, are the main characteristics of the decision making process.

In an effort not to undermine the fine equilibria underlying every adopted act, the ECJ often shows considerable self-restraint in examining the legality of such acts in annulment proceedings. The result is not always conclusive for coherence and legal certainty.

#### 2.4.1. *By-passing traditional commitology rules in the first pillar*

Article 202 EC as implemented by decision 1999/468/EC (second commitology decision) provides that 'other than in specific and substantiated cases where the basic instrument reserves to the Council the right to exercise directly certain implementing powers itself, such powers shall be conferred on the Commission'.<sup>55</sup> In *Commission v Council, Visa Policy*,<sup>56</sup> the question surfaced as to whether the Council had motivated sufficiently a) the fact that it had withheld the power to adopt two regulations for the amendment of the Common Manual for border controls and of the Common Consular Instructions and b) the fact that member states were authorised to modify several aspects of the above regulations unilaterally. The Court found that the motivation contained in the contested acts was 'general and succinct' (para. 53). Nevertheless, on very thin reasoning and using justifications rather than legal argumentation, the Court dismissed the Commission's annulment action, by invoking 'the specificity of the subject matter covered by the contested regulations' (para. 56). This highly contestable solution was adopted flying on the face of Advocate's General Léger's contrary opinion.

#### 2.4.2. *Free choice of legislative instruments in the third pillar*

In *Advocaten voor den Wereld*<sup>57</sup> the formal ground of annulment against the European arrest warrant was that it had been adopted by means of a framework decision instead of a convention. While the arguments of the applicants in this respect were not particularly strong, they expressed the idea that according to Article 34(2) (a) to (d) EU, framework decisions should only be used whenever some approximation of laws takes place, while in (most) other cases the Council should proceed by means of conventions. The Court made an exegesis of the EU provisions related to the legislative powers of the Council in the field of police cooperation and found that they do 'not establish any order of priority between the different instruments listed in that provision, with the result that it cannot be ruled out that the Council may have a choice between several instruments in order to regulate the same subject-matter'.<sup>58</sup>

The above finding calls for two observations. First, both the reasoning and the wording of the judgment suggest that the discretion left to the Council is not restricted to the facts of the specific case. Second, the wide discretion left to the Council is pregnant with meaning, in view of the fundamentally different legal effects of framework decisions (especially after *Pupino*)<sup>59</sup> on the one hand, and conventions on the other.

#### 2.4.3. *First v Third: pillars mapped for their scope*

It is reminded that in *Sanctions for the environment*<sup>60</sup> the Court maintained that first pillar acts may contain rules of criminal law, without a 'twin' third pillar act being necessary. This judgment seems to constitute the (indirect, at least) reversal of previous case law, where the Court had over-stretched the scope of the third pillar to the detriment of that of the first (pillar). In *Commission v Council, air transit visas*<sup>61</sup> the Commission challenged the adoption

<sup>54</sup> And the subsequent Council decision for the use of QMV in most fields of decision making within Title IV EC, decision 2004/927/EC of the Council of 22 December 2004 [2004] OJ L 396/45.

<sup>55</sup> [1999] OJ L-184/23, article 1.

<sup>56</sup> Case C-257/01 *Commission v Council, visa policy* [2005] nyr

<sup>57</sup> See above note 38.

<sup>58</sup> *Advocaten voor den Wereld* para 37.

<sup>59</sup> Above n. 35

<sup>60</sup> Above n. 45.

<sup>61</sup> Above n. 18.

by the Council of Common Action 96/197/JHA on the conditions of delivery of air transit visas. The Commission argued that the text should have been adopted in the form of an Article 95c (then 100c) EC directive, as it concerned the free movement of persons. The Court, ignoring all relevant rules of international law, held that transit through the international zone of airports of the member states does not constitute 'entry' into their territory and, therefore, does not lead to the free movement of people within the member states' territories. Hence, it upheld the contested common action. This artificial distinction between 'transit' and 'entry' was explicitly dismissed some years later by the Strasbourg European Court of Human Rights (ECtHR) in *Amuur /France*.<sup>62</sup> Moreover, the Council itself has adopted Regulation (EC) 1683/95, on the technical specifications of visas, both for entry and for transit, on the sole basis of Article 95c.

A comparison of the judgments in *Sanctions for the environment* and in *Air transit visas* seems to indicate that lately the Court favors a coherent and unitary legislative approach to a piecemeal one based on a rigid and technical distinction between first and third pillar issues. The pivotal criterion for the choice of the appropriate legal basis is, expectedly, the main subject matter of the proposed act.

This last point was made clear in the infamous *Passenger Name Records (PNR)* judgment.<sup>63</sup> In this case the Court held that neither the Commission decision on 'adequate protection' (of personal data by the US authorities) nor the subsequent Council decision which agreed on the transfer of PNR to the US authorities, could be validly adopted under the first pillar. The Court reasoned that both acts only incidentally affected the functioning of the internal market in (air travel) services, while their primary concern was to combat terrorism and to protect public security. Hence, the Court annulled both acts, while keeping them in force for an extra three months, in order to allow for their replacement. The new PNR agreement with the US was adopted in October 2006, in the form a Council decision based on Articles 24 and 38 EU, i.e. under the second and third pillars. The annulment of the initial agreement for formal reasons and not substantive ones relating to the violation of fundamental rights, constitutes a Pyrrhic victory for the European Parliament. This is further explored below.

This mapping of the respective scope of the first and third pillars could not be complete without a mention of the very important cases concerning the imposition of 'smart sanctions' on organizations and persons presumed terrorist.<sup>64</sup> These cases, together with the judgment of the Court in the *PNR* case, clearly demonstrate the close links between the second and third pillars. At the same time they offer important clues on the distinction between the 'community' and the intergovernmental pillars of the EU.

### 3. Substantive law

#### 3.1. Data protection

The judgment of the Court in *PNR* has been criticized for opening an important gap in the protection of personal data.<sup>65</sup> The finding of the Court that the objective of the contested acts did not relate to the functioning of the internal market and thus fell outside the scope of Directive 95/46/EC on data protection<sup>66</sup> is hardly shocking. What is surprising,<sup>67</sup> however, is the total absence in the judgment of any reference to fundamental rights protected under international law and binding on member states (such as i.a. the ECHR) or under member states' own Constitutions.<sup>68</sup> Hence, rights such as the protection of the personality, that of

<sup>62</sup> Decision 17/1995/523/609, of June 25, 1996. In this case the ECtHR argued that the extremely long period that some asylum seekers had to wait in the transit area of Charles de Gaulle airport and in a contiguous hotel while their claims were being processed, did engage France's responsibility for violation of Art 5(1) ECHR on detention conditions and rejected the French claim that the applicants were in an international zone and not within national territory.

<sup>63</sup> Joined Cases C-317 & 318/04 *European Parliament v Council, PNR* [2006] nyr.

<sup>64</sup> Above para. 2.2.1.

<sup>65</sup> See among many, the opinion of the European Data Protection Supervisor, as relayed by Statewatch (<http://www.statewatch.org/news/2006/jun/02edps-pnr-judgment.htm>).

<sup>66</sup> [1995] OJ L 281/31.

<sup>67</sup> It is true that since the ECJ did not annul the contested decision on substantial – but on formal – grounds, it did not have to deal with the substantive claims of the Parliament. However, this judgment is in stark contrast with other recent judgments, where the ECJ has meddled with the protection of fundamental rights, despite the complete lack of EC competence in fields submitted to its judgment, see e.g. Case C-144/04 *Mangold* [2005] nyr.

<sup>68</sup> This omission may be explained on political grounds: it is very likely that the agreement with the USA would not stand a legality control by reference to such norms and would have to be annulled and renegotiated from scratch, with negative political and economic consequences.

privacy or of correspondence, the protection of family life etc, which could ground an obligation of data protection outside the scope of Directive 95/46/EC are totally absent. The practical result of such an astounding silence of the Court is that the latest PNR agreement adopted by the Council in October 2006 is even less protective of personal data than the one annulled by the ECJ.<sup>69</sup>

### 3.2. Schengen Convention (= Convention Implementing the Schengen Agreement = CISA)

#### 3.2.1. Refusal of entry based on the Schengen Information System (SIS)

The Court has been much more protective of individuals and of their personal data in *Commission v Spain, SIS*.<sup>70</sup> This case concerned the practice of the Spanish authorities to refuse entry visas to third country nationals who are family members of EU citizens and are, therefore, covered by the Citizenship Directive (Directive 64/221 at the relevant time).<sup>71</sup> The reason for the refusal was that the persons concerned were registered in the SIS by another member state, Germany.<sup>72</sup> This case highlighted the possible tensions between the free movement of people under the first pillar, on the one hand, and the protection of the external borders of the Schengen area, under the (now communautarised) Schengen Convention, on the other. The Court founded its reasoning on the relevant provision of the CISA (Article 134) combined to the general EC Treaty rules on closer cooperation (Article 43(1)) and found that the CISA may not apply in a way detrimental to the *acquis communautaire*. In this respect, the Court observed that the circumstances which justify the registration of a person in the SIS are considerably broader than those allowing for derogations to the free movement principle under Directive 64/220; not least because information contained in the SIS is not regularly updated. Hence, a mere inscription in the SIS does not, on its own, mean that the person concerned may be refused entry by virtue of Directive 64/220. Two consequences follow. First, the member state which registers in the SIS a beneficiary of free movement under Community law should make sure that the person concerned not only fulfils the CISA conditions, but also constitutes a genuine and present menace for a fundamental interest of society (paras. 50-52). Second, the member state which examines the entry claim of a beneficiary of free movement, may not turn down such a claim on the mere allegation that the person concerned is registered in the SIS, but should examine *in concreto* whether their presence constitutes 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.'<sup>73</sup> For this purpose the SIRENE facility should be fully exploited.

#### 3.2.2. Entry into the Schengen territory

A technical point, but of some importance to third country nationals entering the Schengen territory, was raised before the Court in *Bot*.<sup>74</sup> This case concerned a Romanian citizen during the pre-accession period during which Romanian citizens were exempted from a visa requirement. Their entry into the EU was governed by Article 20(1) CISA, whereby 'aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry'.

The applicant had entered and re-entered into the Schengen area several times, before an expulsion order was made against him by the French authorities. The question was raised as to what is the proper meaning of 'first entry'. Two opinions emerged in this respect. According to the Commission and the Finnish government there should be some periodicity

<sup>69</sup> See the comments by Statewatch, <http://www.statewatch.org/news/2006/oct/05eu-us-pnr-oct-06.htm>

<sup>70</sup> Case C-503/03 *Commission v Spain, SIS* [2006] nyr.

<sup>71</sup> Directive 64/221/EEC of the Council of 25 February 1964, on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56/850, English special edition: Series I Chapter 1963-64, p. 117, which has, in the meantime, been replaced by directive 2004/38/EC on European Citizenship [2004] OJ L 158/77.

<sup>72</sup> It is reminded that, although the categories of persons to be registered in the SIS are foreseen in an exhaustive way by the CISA, large discretion is left to the national authorities for dealing with each individual case. This leads to very important differences on national practices: according to Statewatch, 80% of the totality of SIS inscriptions has been made by Germany and Italy alone, while all the other 11 countries only account for the remaining 20%.

<sup>73</sup> *Commission v Spain, SIS* para. 51.

<sup>74</sup> Case C-241/05 *Bot* [2007].

respectful of the distinction between short/longer term stay, and any new 'first entry' should be lawful only after the lapse of, at least, three months from (the end of) the previous one. The French, Czech and Slovak governments, on the other hand thought that at the end of a three month stay (within six months) it would be enough for the alien to quit the Schengen area for a single day and then make a new 'first entry' allowing him/her to stay for another three months (out of six). In other words, the difference between the two positions was on whether two three-month stays (over a year) may be aggregated on a continuous basis or whether, on the opposite, a three month interval should exist between the two. The Court restricted itself to a literal interpretation of the relevant provisions and followed the latter position. The Court acknowledged that such a solution could lead to abuses of the EU's immigration policy, but held that it was for member states to remedy these risks by modifying the terms of the Schengen convention.

### 3.2.3. *Ne bis in idem*

Another substantive issue which has repeatedly surfaced before the ECJ, is the application, in criminal cases, of the principle *ne bis in idem*, inscribed in Articles 54-58 of the CISA. Article 54 of the CISA stipulates that 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts ...'. This provision extends the territorial scope of the application of the *ne bis in idem* principle from the national to the Schengen-territory level. Hence, it requires member states to recognise the criminal decisions delivered by jurisdictions of other member states, even if these are issued on the basis of different criminal rules, whether procedural or substantial. The ECJ has repeatedly stated that 'nowhere in Title VI of the Treaty on European Union [...] or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the member States'.<sup>75</sup>

On the contrary, the application of the *ne bis in idem* principle is based on the 'necessary implication that the member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other member States even when the outcome would be different if its own national law were applied'.<sup>76</sup>

Notwithstanding this statement, the application of the principle over a variety of legal orders, having each different substantive and procedural rules, has raised two important questions. First, what does 'finally disposed of' mean and, second, when are we in presence of the 'same acts'?

In relation to the first question, the Court has held that the closing of the criminal procedure by an *order* of the *prosecutor* in the framework of a *judicial transaction* (and not by a *formal decision* issued by a *jurisdiction* at the issue of a *trial* proper) does satisfy the requirement of Article 54 CISA. Hence it is binding upon other member states' authorities which are under an obligation to drop any pending criminal procedures for the same acts. However, this does not prevent the victims of criminal acts to seek compensation, in non-criminal proceedings, for the damage suffered. Hence, in joined cases *Gözütok & Brügge*, Mr. Gözütok who had been acquitted by an order of the Dutch authorities for drug possession, could not be prosecuted for the same facts by the German authorities, despite the fact that, in principle, they could establish their jurisdiction over him. Similarly, Mr. Brügge who had been acquitted by an order of the Belgian prosecutor for causing bodily harm to a German lady, could face action in Germany, but only on the initiative of the victim herself and exclusively for her awarding of damages.

More recently, in *Gasparini*,<sup>77</sup> the Court was faced with a case of smuggling and counterfeiting, over a quantity of olive oil supposedly coming from Switzerland (!) and imported into Portugal. The Court held that a decision by the Portuguese Court stating that prosecution was time-barred 'finally disposed of' the trial and, hence, bound the Spanish jurisdictions not to open proceedings afresh. In *Van Straaten*<sup>78</sup>, a drug case delivered the same day as *Gasparini*, the Court held that a decision of the Dutch Court acquitting a defendant on grounds of insufficient evidence also 'finally disposed of' the pending trial. On the contrary, however, the Court was not ready to endorse a 'pre-emptive' application of *ne*

<sup>75</sup> See, for the first time Joined Cases C-187 & 385/01 *Gözütok & Brügge* [2003] nyr, para 32.

<sup>76</sup> *Ibid* para 33.

<sup>77</sup> Case C-467/04 *Gasparini* [2006] nyr.

<sup>78</sup> Case C-150/05 *Van Straaten* [2006] nyr.

*bis in idem* principle. In other words, if the prosecution authorities of one member state cease prosecution precisely because the same facts are already under examination by the authorities of another state, the authorities of the latter are not bound by the decision of the former to cease prosecution. What counts, according to the Court, is that the authorities of at least one member state deals with the substance of the case.<sup>79</sup>

The second issue addressed by the ECJ was to define when the authorities of a member state are faced with the 'same acts' for which decision by another member state has already been issued. Also in this field, the ECJ has adopted a teleological interpretation of the provisions of the CISA, at the expense of a strict respect of penal law systems of the member states. In particular, the ECJ considers that the *ne bis in idem* principle aims at ensuring free movement within the EU territory and that right

'is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Contracting State, he may travel within the Schengen area without fear of prosecution in another Contracting State'.<sup>80</sup>

Therefore, the ECJ judges that 'Because there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States'.<sup>81</sup>

On the contrary, what is important is 'whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter'.<sup>82</sup> Consequently, in *Van Esbroeck* the answer to the question whether the same person could be sentenced in one member state (namely Norway) for drug import and, after serving their sentence, be prosecuted for exporting the same substances also in the member state from which they exported them (namely Belgium), was clearly to the negative. The very similar *Van Straaten* case received a very similar judgment by the ECJ, having, however, more far-reaching consequences. In this case, prosecution which was initiated by the member state where the drugs had been imported (namely the Netherlands) concerned different quantities of substances as well as accomplices other than the ones prosecuted in the member state where the import had taken place (namely Italy). Nevertheless, the ECJ did not preclude the possibility for the offence being 'the same' according to Article 54 of the Schengen Convention, but entrusted the remanding court with the verification of the preciseness of the facts.

### 3.3. European arrest warrant

The legality of the European arrest warrant has been challenged in many member states and has eventually reached the Court in *Advocaten voor de Wereld*.<sup>83</sup> The formal/procedural aspects of this judgment have been presented above. The substantive issues raised, however, are at least as important. First, the applicants argued that the fact that offences listed in the framework decision could lead to the detention and surrender of individuals in one member state, on the basis of incriminations contained in the legislation of another member state, violated the principle of the legality of offences (*nullum crimen nulla poena sine lege*). Second they argued that the fact that, for these same offences, surrender could be made without the verification of double criminality (i.e. that facts for which an arrest warrant has been issued constitute an offence under the law of the member state of execution) was a source of unjustified discrimination between defendants, as those pursued for one of the selected offences would benefit of lesser guaranties. Things were even worse, the applicants argued, since the framework decision only describes the various offences in a 'vague and imprecise' way.<sup>84</sup>

The Court rejected both arguments.<sup>85</sup> It stated that the EU is founded on the rule of law and, therefore, both EC Institutions and national authorities alike respect fundamental

<sup>79</sup> Case C-469/03 *Miraglia* [2005] nyr.

<sup>80</sup> See e.g. *Van Straaten*, above para 46, and before that (and for the first time) Case C-436/04 *Van Esbroeck*, [2006] nyr para 34.

<sup>81</sup> *Van Esbroeck*, above, para 35.

<sup>82</sup> *Ibid* para 38.

<sup>83</sup> Above n. 38.

<sup>84</sup> *Ibid* para 48.

<sup>85</sup> Although each argument is addressed separately in the judgment, the reasoning is unique and covers both – this is how it is presented in the following paragraphs.



rights when implementing the law of the Union.<sup>86</sup> It went on to note that 'the framework decision does not seek to harmonise the criminal offences in question'<sup>87</sup> and that 'nothing in Title VI of the EU Treaty [...] makes the application of the European arrest warrant conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question'.<sup>88</sup> Hence it held that it was enough that 'the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which [...] must respect fundamental rights and fundamental legal principles'.<sup>89</sup>

The Court explained – and stressed – that the adoption of the framework decision by the Council took place 'on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States'.<sup>90</sup> Hence, the Court implied, that the application of the framework decision should also be based on these same principles.

This is a highly political judgment in which the Court tries to establish some basic interpretative principles, to the attention of national jurisdictions in need of applying or controlling the legality of national legislation which implements the European arrest warrant. It is yet another instance in which the Court refuses to annul an EC act, by putting faith on national authorities for the respect of fundamental rights.<sup>91</sup> Moreover, it is a striking application of the principle of mutual recognition – strengthened in this occasion by 'trust' and 'solidarity' – as a straightforward substitute for the lack of harmonisation.

### 3.4. Immigration Policy

The tendency of the ECJ not to subvert subtle balances achieved in Council negotiations is displayed in the most evident – and objectionable – of ways in the judgment on the *Family Reunification* directive.<sup>92</sup> Directive 2003/86/EC, adopted following extremely lengthy and scrupulous negotiations, is in fact a selection and legitimation – a 'best of' all limitations and restrictive practices in force (or even forthcoming) – in the member states at the time of its adoption. It is a typical case in which the requirement of unanimity in the Council has led to the adoption of the lowest common denominator as the common rule.<sup>93</sup> The European Parliament brought annulment proceedings against the three most outrageous provisions of the directive: a) the possibility open to member states of imposing integration measures on children over 12 years of age b) the option of admitting for reunification only children below the age of 15 – as opposed to 18 and c) the power of making immigrants wait for a period extending to three years before being allowed to claim reunification for members of their family.

The Court, reasoning in a quite unconvincing way, rejected the Parliament's action. The main arguments put forward by the Court are as follows: *First*, the directive allows member states significant discretion. This discretion, however, should be used in accordance with the general provision of the directive (Article 5 § 5), according to which member states 'when examining an application, the member States shall have due regard to the best interests of minor children'. In other words, the more specific rules of the directive which make possible the violation of the child's family life are deemed legal only because they are not sufficiently clear and because their application may be moderated by a general rule (!) contained in the same directive (para. 63) and by the general obligation of respect of fundamental rights (para. 104). *Second*, the ECJ repeatedly states that the aim of the directive is to ensure that family rights are offered a level of protection equal – but not superior – to the one already ensured under Article 8 of the ECHR.<sup>94</sup> This is a political statement, corresponding to a choice which is not evident. Indeed, one may question the added value of a directive which, while containing ambivalent rules which leave a great

<sup>86</sup> *Ibid* para 45; see also the developments above at 2.2.1.

<sup>87</sup> *Ibid* para 52 and, again in para 52.

<sup>88</sup> *Ibid* para 59; see also Gözütok & Brügge above n. 75, for the *ne bis in idem* principle.

<sup>89</sup> *Ibid* para 53.

<sup>90</sup> *Ibid* para 57.

<sup>91</sup> The same logic prevailed in *Ayadi, Hassan, Gestoras and Segi* (for which see above 2.2.1 and below 3.4) as well as in *EP v Council, family reunification* (for which see below 3.4.).

<sup>92</sup> Case C-540/03 *EP v Council, Family reunification* [2006] nyr.

<sup>93</sup> See among many, S. Peers 'EU Law and Family Reunion: A Human Rights Critique' (2005) *Essays for Civil Liberties and Democracy in Europe* n. 16, European Civil Liberties Network, <http://www.ecln.org>; A. Bailey & P. Boyle 'Untying and Retying Family Migration in the New Europe' (2/2004) *JEMS*, 229-241. Also, F. Kauff-Gazin 'Quand le juge refuse de reconnaître l'existence d'un véritable droit au regroupement familial' (2006) *Europe*, comm. 236, p. 13.

<sup>94</sup> See e.g. paras 62, 64, 82 etc of the judgment.

amount of discretion to member states (see the first argument of the Court), merely put into black-letter-law obligations which are already binding on member states by virtue of the ECHR. *Third*, the Court observes that the failure of the directive to achieve any substantial harmonisation and 'the coexistence of different situations, ... merely reflects the difficulty of harmonising laws in a field which hitherto fell within the competence of the member States alone'.<sup>95</sup> Needless to comment on the legal value of such an argument (...). *Finally*, the ECJ states in a rather provocative way that 'if those courts [of member states] encounter difficulties relating to the interpretation or validity of the directive, it is incumbent upon them to refer a question to the Court for a preliminary ruling in the circumstances set out in Articles 68 EC and 234 EC'.<sup>96</sup> In other words, the ECJ upholds the contested provisions of the directive in the context of the annulment proceedings, only to reserve the right to judge them as non-applicable in the context of future preliminary rulings, depending on the transposition options followed by each individual member state. This solution, justified as it may be on grounds of policy, certainly does not favour legal certainty. The significance of the Court's judgment becomes all the more apparent, when read against the Advocate's General opinion. Ms Kokkot had proposed that, if the annulment action were not altogether dismissed on formal grounds (an option not followed by the Court), then the second and third pleas of the Parliament should be upheld. Therefore, according to its Advocate General, the Court should annul both the 15-year old limitation (for violation of the obligation of consultation with the European Parliament) and the condition for the (up to) three-year waiting period (for violation of the right to family life).

It would seem, then, that the main drive of the ECJ in this judgment was political, not judicial. Indeed, the Court resisted undoing a piece of legislation which would be almost impossible to readopt under the unanimity rule (still applicable in this field),<sup>97</sup> especially in the context of the enlarged EU.

### 3.5. Antiterrorism Policy – Fundamental Rights

The CFI and ECJ judgments concerning the imposition of 'smart sanctions' to terrorism-related organisations and persons have already been briefly touched upon above.<sup>98</sup> A detailed examination of those very important judgments is beyond the scope of this study due to both the extent of the necessary discussions, and the fact that the decisions relate primarily to the CFSP (second pillar).<sup>99</sup> However, to the extent that the contested common positions (at least in the most recent cases) have been adopted also on the basis of Article 34 of the EU Treaty (i.e. an AFSJ legal basis), a brief (and, by definition, incomplete) mention is to be made to the substantive part of those judgments. As already stated, the applicants in these cases had attacked a) the common positions b) the regulations and c) the implementing regulations and/or decisions under which 'smart sanctions' were imposed on them. The substantive grounds of annulment and/or of the claim for damages involved the triple violation a) of defence rights of the affected parties b) of the motivation obligation and c) of the right to an effective judicial protection. In the (first two) judgments, *Yusuf and Kadi*, the CFI rejected the arguments. It did so despite having held the abovementioned rights to be *jus cogens* according to international law. This is due to the fact that it considered that the EC Institutions did not do more than comply with their duties resulting from the UN resolutions. In the (second two) decisions, *Ayadi and Hassan*, the CFI also rejected the annulment actions. The CFI, however, only reached this conclusion because it took for granted (and thus imposed) the obligation of the applicant's member state to take all necessary measures in order to protect the aforementioned fundamental rights. In other words, member states should grant their citizens and/or habitually residents 'diplomatic protection'. These decisions are particularly far-reaching, to the extent that state activity with respect to fighting terrorism encompasses, on the one hand, an important element of secrecy and confidentiality and, on the other hand, significant discretionary powers (*actes du gouvernement*).<sup>100</sup>

<sup>95</sup> *EP v Council, family reunification*, para. 102.

<sup>96</sup> *Ibid* para. 104.

<sup>97</sup> It is reminded that after the end of the five-year transitional period in May 2004 and the adoption of decision 2004/927/EC of the Council ([2004]OJ L 396/45) most acts of Title IV are adopted with qualified majority in the Council, under the co-decision procedure with the EP. The most important exception to the above rule, where the Council still decides by unanimity is legal immigration.

<sup>98</sup> See 2.2.1 above.

<sup>99</sup> The Court itself, in the thematic index of its judgments, classifies these judgments under CFSP.

<sup>100</sup> See D. Simon & F. Mariatte above note 19, p. 7.

Even more ground-breaking is the judgment in the more recent *Mojahedines* case, where the CFI did, for once, annul the individual decision affecting the applicants. The CFI reached this conclusion for two reasons. First, the UN resolution granted discretion to the EC Institutions as regards the individualisation of sanctions. Second, in no stage of the particularly complex procedure which led to the adoption of the attacked act were the persons concerned given the right to a real hearing, nor were they offered some substantive motivation of the act against them. After this judgment, the standard of protection due by both the member states' authorities and the EC Institutions alike is quite high. The persons concerned should be given a real possibility of hearing, if not before, at least within a reasonable time after the adoption of a measure unfavourable to them.

More importantly still, in *Gestoras pro Amnestia* and *Segi* the Court held that the EU is based on a wide 'rule of law' principle which encompasses a subjective right to judicial control of all acts affecting individual rights. Further, it went as far as suggesting that whenever such a judicial control is not directly provided for by the EU legal system, a) indirect access to the ECJ should be open by means of the preliminary procedure, even if this goes against the letter of the EU Treaty and b) the national legal orders of the member states should strive to put up some control procedure which would, in turn, open the way for a preliminary question to the ECJ.

There is no doubt that the protection of fundamental rights in the above ways, established by the ECJ in a field as sensitive as fighting terrorism, is the 'floor' (*planché*), i.e. the minimum level of protection below which no national or EU authority may deviate. Thus a 'benchmark' is set on the basis of which all future actions - whether pursued by individual member states or by the EU itself - shall also be judged, in matters concerning the very core of the AFSJ.

#### 4. Conclusion

It is not easy to draw conclusions from the aforementioned, mostly recent, case law of the ECJ. From the Court's make-up in the vast majority of the cases, the extremely high number of intervening states and the very wording of most of the judgments, it becomes clear that the AFSJ touches upon issues of cardinal importance to the EU. The overall position of the ECJ appears extremely political, as it seems to pursue the following goals:

- to bridge the institutional gaps resulting from the three-pillar structure of the EU, in order to
- clearly establish its own role as the ultimate guarantor of legality in this new field of EU competence, in a way parallel to the one followed in the internal market. In order to achieve this goal while minimizing the frictions, the ECJ pursues
  - not to overturn legislative acts which have been difficult to adopt (and may be even more difficult to replace, if annulled) under the unanimity principle,
  - to ensure the protection of fundamental rights, subject, however, to the proviso above, i.e. not to vex too much the legislator. Hence, protection is not as absolute as it is in the internal market field<sup>101</sup> and is, in a way, more decentralised, as it relies, to a large extent, on member states' authorities,
  - to promote cooperation between member states in penal matters, by adopting solutions which make further harmonisation almost imperative.

The Court seems decided to pursue the above objectives with or without the Member States...

<sup>101</sup> See e.g. V. Hatzopoulos & T. Do, The Case law of the ECJ concerning the free provision of services: 2000-2005 (2006) CMLRev 923-991, 986ff.



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